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IN THE

Supreme Court of the United States

October Term, 1961

No. 335

CIA. DE NAV. SAN GEORGE, S.A., SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners,

vs.

IOANNIS KOUFOPANTELIS, *et al.*,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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RESPONDENTS' BRIEF

Statement

The petitioner, Cia De Nav. San George, S.A. (hereinafter called San George) seeks leave to appeal from orders of the Court of Appeals affirming four decisions (5a-9a)* and orders of United States District Judge Cashin (Court of Appeals Docket Nos. 26,526-7-8-9) denying motions to vacate decrees previously rendered against the said petitioner. The Court of Appeals opinion is Reported at 291 F 2d, 907.

Petitioners, San George, Santa Maria Shipowning & Trading Company, S.A., Cia. De Nav. San Martine, S.A. and Pan Athena Trading & Shipping Company, seek to review a separate and different order made, pursuant to the law of the State of New York, by the District Court (1a-5a) and affirmed (16a-19a) by the Court of Appeals (Court of Appeals Docket No. 26,288), granting a judgment against each of them for diverting and receiving assets of San George in an amount sufficient to satisfy one of the above decrees (Koufopantelis) that Judge Cashin had refused to reopen.

Question 1

The first issue on which certioriari is sought relates to an alleged discrepancy between the interpretations previously given by the Federal Courts to Admiralty Rules 28 and 39 of the Supreme Court Admiralty Rules and the decision made by the Court of Appeals herein.

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* References numbered from 1a to 30a are to pages of the Appendix to the Petition herein; pages 82a to 89a are to Appendix to Brief of Appellees in Court of Appeals, Docket Nos. 26,526-7-8-9.

The four decrees were filed respectively on June 16, 1959 (84a), June 16, 1959 (85a) and two on April 30, 1959 (86a). As may be seen by an inspection of the said decrees they were, in all respects, final decrees (84a-86a), with the possible exception of one provision in the Bardis decree, and with that one we are not concerned here Although petitioner was represented by counsel (5a, 7a, 56a), the decrees herein were entered on SAN GEORGE's default after petitioner had deliberately and calculatedly permitted the entry of such default decrees (56a) in the belief that the appellees would be unable to effectuate collection of the amounts of such decrees.

On July 20, 1959, (p. 12, Brief of Santa Maria, etc. Docket #26288 in Court of Appeals) the appellees instituted proceedings supplementary to judgment for the collection of the said four decrees by the service of a subpoena in supplementary proceedings. Although time still permitted the taking of an appeal from each of the said decrees, and time still permitted an application to be made pursuant to the provisions of Rule 39 of the Supreme Court Admiralty Rules for an order vacating two of the said decrees, no effort was made to obtain the modification or reversal of the said final decrees. Instead, the petitioners herein entered upon a vigorous opposition to the collection of the said decrees, an opposition that terminated with the making of Judge Palmieri's order of March 21, 1960, and the decision of Judge MacMahon of March 20, 1961. (Appendix A hereof).

It was only when it appeared to the said petitioner. from the order of Judge Palmieri of March 21, 1960 (87a), that

the said decrees were in fact collectible, that the applications to vacate the decrees were made by notice of motion dated May 17, 1960 (27a-28a) and heard on June 14, 1960 (6a). Thus, petitioner waited in two cases for more than thirteen months to seek to vacate the said decrees and in the remaining two, more than eleven months.

The rules here in question, Rules 28 and 39 of the Admiralty Rules of the Supreme Court, have been in effect in substantially their present form since their enactment as former Rules 29 and 40, respectively, in 1842 (Act of August 23, 1842, c. 188; 5 Stat. 516). During all the intervening time, the administration and interpretation of the two rules has been uniform and consistent up to (the claim of the petitioner to the contrary notwithstanding) and including the decision of the Court of Appeals herein sought to be reviewed.

Pursuant to such uniform construction of the two rules, Rule 28 is not here applicable, because same has always been held to apply to interlocutory or non-final decrees, whereas the decrees herein were final. Where a respondent has been adjudged in default, but the case is still "*in fieri*" (*Storey* v. *Storey*, 221 Fed. 262, 263), the case remains open until the damages may be assessed in order that a final decree may be entered. *U. S.* v. *One Chrysler Sedan*, 46 F. Sup. 897, 898; *Afghan Motor Co.* v. *The Silverash*, 46 F. Sup. 306, 308; *The Bella*, 270 Fed. 287, 288; *Storey* v. *Storey*, 221 Fed. 262, 263; *The Dredge A*, 217 Fed. 617, 622. Obviously, since the case remains open until a final decree is entered, there need be no limitation of the time within which a respondent may seek to vacate a default, since the case is still pending.

However, for the same reasons, once the damages have been assessed and a final decree entered, then the applicable Rule is 39.* *Benedict on Admiralty,* 6th Ed. Vol. 2, states, at page 419,

> "Therefore when a defendant has been pronounced in contumacy and default and the libel has been adjudged to be taken *pro confesso* against him, the court may, in its discretion, set aside the default. That power is to be construed in connection with General Admiralty Rule 39 under which, within sixty days after the entry of the final decree on default, the court, in its discretion, upon motion of the respondent or claimant and payment of costs, may rescind the decree. But after the period prescribed by the rules has elapsed, the court has no power to open or rescind the decree in default cases, the power of the court to open a final decree entered. . . ."

Without exception, the Courts have held, up to and including the decision of the Court of Appeals herein, that on the expiration of the 60 days provided in Rule 39, the Court is divested of power or jurisdiction to make an order with respect to the said final decree. *Mariners Service, Inc.* v. *Dunns Marine Railway, Inc.,* 181 Fed. 2d 596, 597; *United States* v. *One 1941 Chrysler Sedan,* 46 Fed. Sup. 897, 898; *The Bethlehem,* 4 Fed. 2d, 308, 311; *The Duiveland,* Fed. Cas. 4122. The Court will immediately recognize that Rule 39 is but an extension of the long standing rule of the Federal Courts, which holds that an application to vacate or modify a final decree or judgment must

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* In the instant cases, the decrees were "for the recovery for a fixed sum of money and constituted the final action of the court in disposal of the libels and as such were final" (13a).

be made at the term of the Court in which the decree is rendered. *United States* v. *Mayer,* 235 U. S. 55; *Wetmore* v. *Karrick,* 205 U. S. 141; *Phillips* v. *Negley,* 117 U. S. 665; *Bronson* v. *Schulten,* 104 U. S. 410; *Brooks* v. *Railroad,* 102 U. S. 107; *The Martha,* Fed. Cas. 9144 p. 866; *Snow* v. *Edwards,* Fed. Cas. 13145; *Petit* v. *One Steel Lighter,* 104 Fed. 1002. In Rule 39 the "term" rule is extended by the provision that the term is deemed to be extended for a period of 60 days after the entry of the decree thus effectively enlarging the time limitation.

Having chosen to contest the collection of the decrees in supplementary proceedings, rather than to appeal the decrees herein or to seek a modification within the time permitted by Rule 39, the petitioners are now forced to eschew any claim for relief pursuant to Rule 39, and to claim, instead, the right to seek it under Rule 28. That Rule 28 is inapplicable because the decrees here are final rather than interlocutory, has not prevented the petitioner from so urging. Indeed the petition herein states, at p. 10 thereof, that the judgments entered herein "must be deemed interlocutory in nature and subject to the provisions of admiralty Rule 28 alone . . ." It is solely for this reason that the petitioner here urges this Court to "deem interlocutory" what are otherwise indisputably final decrees (12a, 13a, 84a-86a).

In order to make a case for the granting of certiorari, the petitioner alleges that the Court of Appeals has for the first time herein held that the provisions of Rule 28 are, in fact, "restricted" by those of Rule 39 and that, accordingly, after the expiration of the 60 day period set

forth in Rule 39, the District Court is powerless to exercise the discretion granted it by Rule 28. This misreading of the decision of the Court of Appeals arises from wishful thinking. The Court of Appeals herein has said no more or differently than has always been the rule: that after Rule 39 became applicable by reason of the entry of final decrees, then the 60 day provision thereof became applicable and the Court powerless on the expiration of 60 days to affect the result. Thus, Judge Hand stated (12a):

> ". . . but Rule 39 gives the Court discretion to rescind the decree that has pronounced him in default within a period of sixty days after the default decree has been entered."

In discussing Rules 28 and 39 and holding that both related to defaults and to opening such defaults, the said decision further stated that Rule 39 contains the additional proviso of the sixty-day time limitation. Construing the same in conjunction with the instant case and continuing the uniform construction of the relationship of Rules 29 and 39, Judge Hand stated: "Thus, applied to the suits at bar nothing could be done after sixty days to change the decrees entered on default", because such decrees "had unconditionally declared that the libellants should recover the amounts fixed in the decrees themselves" (12a).

Clearly, the prevailing opinion held, in keeping with the jurisprudence on the subject, uniform for the last 119 years, that the instant decrees were final, and therefore controlled by the sixty-day provision of Rule 39.

In referring to the District Court opinion of Judge Cashin, Judge Hand took occasion to note that the former had failed to pass upon the finality of the respective decrees and, therefore, upon the relationship of Rules 28 and 39 to the instant case. He noted, also, that the petitioner's application in the District Court had been denied in the exercise of Judge Cashin's discretion on the bases of inadequate merits and of proposed defenses.

In doing so, he pointed out that the "quoted" portions of both Rules 28 and 39 (12a) did not confine either rule to "final" decrees *in haec verba.* It is a portion of Rule 39 not "quoted" by Judge Hand that contains the sixty-day provision as Judge Hand points out.

By reference out of context to a later sentence in this opinion, petitioners now claim (petition p. 7) that Judge Hand ruled that the sixty-day proviso of Rule 39 was applicable to both rules, and, allegedly therefore in some conflict with the previous jurisprudence.

That such claim is wishful thinking is apparent not only from the fact that Judge Hand immediately states that Rule 39 does apply and that the decrees were final (13a) but from petitioners' own statement that it would have the Court "necessarily" call white, black, and these undisputedly final decrees "deemed interlocutory" to accomplish the result petitioner seeks (petition p. 10).

Actually, Judge Hand nowhere states that the sixty-day provision of Rule 39 is also applicable to Rule 28, and in the absence thereof, the entire basis of petitioners' application fails. Properly read, the opinion states no more than the long established rule that when Rule 39 has be-

come applicable because of the entry of a final decree, then the sixty-day provision, likewise, becomes applicable, regardless of what might have been the situation prior to the interlocutory decrees being superseded by final decrees.

No reason for the granting of certiorari is presented in this respect.

Question 2

The second issue sought to be raised, even more lacking in merit for purposes of certiorari than the first, presents only a question of State, and not Federal, law.

Section 794 of the Civil Practice Act of the State of New York provides so far as relevant:

> "At any time after the commencent of a special proceeding authorized by this article, the judgment creditor may by notice of motion served . . . upon the judgment debtor . . . such third party . . . apply to the court for an order directing the said third party to pay to the judgment creditor, . . . a sum on account of the alleged indebtedness not exceeding the judgment with interest. If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial of the issues in an action brought by the judgment creditor . . ."

After the entry of the final decrees herein and the institution of supplementary proceedings on July 20, 1959, it appears that the petitioner, San George, together with the other petitioners, the third parties, San Martine, Santa Maria and Panathena, had diverted over $1,800,000 which the remaining third party, Cargo and Tankship Management Corporation, owed to the debtor, San George. This was effected by changing the books of Cargo and Tankship Management Corporation so as to show that it owed the money to the other corporations, Santa Maria, San Martine and Panathena, rather than to the debtor, San George. Such fraudulent transfers were made without any claim of consideration therefor or any indication of any right on the part of the said Santa Maria, Martine or Panathena to receive the same (17a).

The appellees thereupon moved in the *Koufopantelis* case only (Court of Appeals Docket #26288) before Judge Palmieri for an order pursuant to §794 directing the said third party recipients of the San George money to pay to the judgment creditors an amount sufficient to satisfy the decree in that case. Judge Palmieri's order made findings of all the facts essential to the making of an order under the provisions of the said §794 of the New York State Civil Practice Act (3a-4a).

The Court of Appeals herein affirmed the said order of Judge Palmieri and the finding that neither the judgment debtor (San George) nor the third parties (the other petitioners) had "shown such facts as might be deemed by the court to entitle [either] to a trial of the issues . . ." (16a-19a).

Subsequent to the order of Judge Palmieri in the *Koufopantelis* case, and prior to the affirmance of that order by the Court of Appeals, a similar application was made to another District Judge in each of the other three cases (Appendix A). There, Judge MacMahon, on March 21, 1961, and prior to the decision of the Court of Appeals in the *Koufopantelis* case (Court of Appeals Docket #26288), a formal opinion on practically identical papers and exhibits as were before Judge Palmieri, again made the same findings, holding that the same petitioners had failed to show facts such as to entitle them to a plenary trial. Such decision of Judge MacMahon, though not presently before this Court, so lucidly expounds the identical lengthy, if not complicated, facts that were found by Judge Palmieri and the Court of Appeals in the *Koufopantelis* case, that an extract thereof is attached hereto as Appendix A.

The instant application but repeats the naked and factually unsupported contentions that were urged before Judge Palmieri, the Court of Appeals and Judge MacMahon, all of whom found that none of the petitioners had sustained the burden cast upon them of showing "facts" that would entitle them under §794 to plenary trial.

Whether or not facts were shown within the meaning of §794, so as to warrant a trial instead of a disposition on motion, is purely a matter governed by the law of the State of New York. No federal question is presented nor is there any indication that the decision herein constituted any deviation from the customary application of the referable laws of the State of New York.

No reason for the granting of certiorari is presented here either.

CONCLUSION

The application for certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX

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The third parties next contend that the judgment creditors have failed to show the existence of the debt. In support of this, they point to the fact that they did not even examine the third parties in the instant supplementary proceeding. Rather, the judgment creditors rely on examinations conducted earlier in a companion case, *Koufopantelis* v. *Cia de Nav. San George, S.A.*, Ad. 189-272, in which a motion identical to the one under consideration was granted on March 9, 1960.*

The earlier examination was necessarily limited to the books and records maintained by Cargo & Tankship, the judgment debtor's disbursing agent, since the records of the judgment debtor and the shipowning third parties had been sent to Greece and destroyed.

In addition to that suspect conduct, the examination did reveal that as of January 1, 1959 Cargo & Tankship's records showed a credit of over $1,000,000 owing to the judgment debtor. On January 4, 1959, the judgment debtor sold its ship, the Santa Despoina, and received $860,000 cash over and above the mortgage on the vessel. This money was deposited in the judgment debtor's account at the First National City Bank on January 5. Between that date and January 26, Margaronis withdrew $805,000 from the debtor's bank account, and that sum was added to the existing credit of the debtor on the books of Cargo &

* An appeal taken from the order entered on that motion is presently pending before the Court of Appeals.

Tankship. Thus, the total amount owed by Cargo & Tankship as of January 31 was over $1,800,000. On April 30, that debt was still shown on the books of Cargo & Tankship. On that same day, two judgments aggregating $12,601.75 were entered against the judgment debtor. A month later, on May 31, 1959, the books of Cargo & Tankship still showed a credit to the judgment debtor of over $1,800,000. Two weeks later, on June 16, a third judgment in the amount of $39,220.96 was entered against the judgment debtor. The credit of over $1,800,000 on the books of Cargo & Tankship remained in existence until July 23, but it was evaporated on the following day by a mere book entry in the Cargo & Tankship journal which transferred $1,131,000 of the credit away from the judgment debtor to the shipowning third parties.*

The third parties have not shown, and indeed do not even claim, that the judgment debtor received any consideration whatever for the transfers to them. Rather, they vaguely explain the July 24 transfer as an "auditor's adjustment" necessitated by a balancing of mutual accounts maintained by Cargo & Tankship for the "Santa" group of vessels.

According to the affidavit of Cargo & Tankship's secretary, there was actually one account for all the ships in the "Santa" group, and the only figure of any significance, according to him, was the net balance for all the ships. The net balance due the owners of all the Santa ships, as

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* Cia de Nav. San Martine received a credit of $68,423.82; Panathena Trading & Shipowning Company, $312,540.45; and Santa Maria Shipowning & Trading Corporation, $753,564.11.

of June 30, 1959, was only $843.39, and on July 31, 1959, it was $20,166.69.

The statement that the shipowners had a mutual account, however, fails to explain how a debt of over a million dollars, $805,000 of which consisted of cash withdrawals from the judgment debtor's bank account, could be dissipated and transferred without consideration to the third parties without creating an obligation to the judgment debtor. The plain fact remains that on January 1, 1959, the judgment debtor had an ocean-going vessel; that on January 4, 1959, it had over $800,000 in cash; that in April and June of 1959, the judgments involved here were entered against the debtor; that until July 23, it was credited with $1,800,000 on Cargo & Tankship's books; and that on July 24, 1959, it had neither vessel, cash, nor credit.

Under the applicable New York law, the assets of a corporation are subject to the rights of its creditors, who may reclaim them from transferees who have taken without adequate consideration. Section 15, New York Stock Corporation Law; Section 60, New York General Corporation Law; Section 273, New York Debtor and Creditor Law; *American Surety Co.* v. *Conner*, 251 N. Y. 1, 12, 166 N.E. 783 (1929); *Bartlett* v. *Drew*, 57 N. Y. 587 (1874).

A mere recitation of the facts garnered from Cargo & Tankship's records impels the conclusion that the transfer to the third parties was fraudulent. Clearly, they constituted a violation of the rights of the judgment debtor's creditors and overwhelmingly establish that the third parties are indebted to the judgment debtor in amounts far in excess of the judgments in these actions.

The third parties also contend that any indebtedness owing to the judgment debtor at the time of the Koufopantelis examinations conducted in the fall of 1959 may not have been in existence on September 26, 1960 when these proceedings were instituted. In support of their conjecture, they point to the fact that a supersedeas bond, posted on April 1, 1960 in the Koufopantelis action, removed any restraint on further transfers. In short, they contend that a debt in existence on April 1, 1960 may have been satisfied or, at any rate, the court cannot find, without further evidence, that the debt still existed on September 26, 1960.

This contention ignores the explicit requirement of Section 794 that third parties present facts, not speculation, which negate the judgment debtor's evidence of the existence of a debt.* The affidavits of the representative of the third parties are utterly lacking in such evidentiary facts. *Cf., Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715, 718 (2 Cir. 1943).

Accordingly, the court finds that the third parties are presently indebted to the judgment creditors in amounts in excess of their respective judgments. The motions are therefore granted. Submit orders.

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* ". . . If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial. . . ."